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No. 73-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151, *Petitioners,*

v.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151, *Petitioners,*

v.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, and Messrs. C. L. Dennis, G. E. Stephenson, and George A. Smith (BRAC et al.), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 1, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, issued on November 8, 1972, not yet reported, appears in Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 1, 1973. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a vote taken on a proposed dues increase by 1235 delegates at a regular national union convention by a show of hands followed by a standing count, in accordance with the unanimously adopted rules of the convention and of Robert's Rules of Order, and declared by the presiding officer to constitute a two-thirds majority in favor of the increase, which is challenged by a delegate, whose motion for a recorded vote is put to a vote of the convention and defeated in accordance with convention rules, is valid under Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) against the claims of a few dissenting members not specifically pleaded in a complaint and supported by only three affidavits expressing a belief that the increase was not adopted by majority vote of the delegates.

2. Whether under the circumstances enumerated above, such affidavits are sufficient to create an issue

as to the vote count under the statute and impose upon the union the burden of proving to the District Court that the statutory requirement of a majority vote has been met.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Section 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C., Section 411(a)(3)(B)) which reads as follows:

> "(3) *Dues, Initiation Fees, and Assessments.*— Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> * * *
>
> (B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization; Provided, That such action on the part of the executive board or

similar governing body shall be effective only until the next regular convention of such labor organization."

STATEMENT OF THE CASE

This case concerns a suit by certain members of BRAC seeking to invalidate a dues increase voted by the May, 1971 regular Quadrennial Convention of the union on the grounds that the requirements of Section 101(a)(3)(B) of the LMRDA (29 U.S.C., Section 411(a)(3)(B)) had not been met. (Appendix "A", 1a-2a.)[1]

BRAC represents, pursuant to the Railway Labor Act (45 U.S.C., Section 151, et seq.), approximately 200,000 employees of the nation's rail and air carriers in the craft or class of office, clerical, station and stores employees, of whom 160,000 are full dues paying members. The costs of such representation are substantial because of lengthy mandatory procedures for collective bargaining and the compulsory arbitration of grievances. Such costs, which must be paid from members' dues, have been increased by both rapid inflation and problems arising from the deteriorating position of the railroads. During the period following the May, 1967, BRAC Convention, the total dues paid by members to the Grand Lodge and subordinate units of the union was $5.50 a month of which the Grand Lodge received

[1] The original complaint was filed by members of a BRAC local lodge. Amendments thereto sought to expand the suit into a class action representing all members. This effort has been opposed by BRAC. The case has not been certified as a class action by the District Court under Rule 23(c) of the Federal Rules of Civil Procedure as respondents filed a motion for summary judgment on the issue of liability. (Respondents' Printed Appendix in Court of Appeals, 15. 37.)

as a per capita tax $2.10. By December 31, 1970, the Grand Lodge accumulated a deficit for the four-year period of $8,477,314. It was, therefore, clear that a substantial dues increase would need to be voted by the BRAC 1971 regular Convention. (Petitioners' Printed Appendix in Court of Appeals, 4-11.)

During the spring of 1971, some thirty-five proposals relating to dues were submitted to the Grand Lodge for Convention action. These were printed and mailed to the 1235 Convention delegates previously elected by secret ballot in their respective local lodges. Such proposals were also submitted to the Convention Committee on the Grand Lodge Constitution and Laws which considered the proposals in open meetings which any delegate was free to attend and express his or her views. The Committee made a written report to the Convention recommending total dues of $10.00 per month ($4.00 to the Grand Lodge) for the period July 1, 1971, to July 1, 1973, to be increased to $12.00 per month on the latter date. This report was considered and voted on in accordance with the Convention's Rules of Procedure adopted at the opening session. (Petitioners' Appendix, 11-26.)

These rules, which are reproduced in full in Appendix "C" hereto, regulated, among other things, the submission of proposals, debate thereon, amendments thereto, and delegate voting. Rule 18 provided that any question of a parliamentary nature not covered by the rules or the BRAC Constitution and related laws should be decided by Robert's Rules of Order. Rule 14 regulated voting, except officer elections, as follows:

> "Rule 14. (A) The manner of voting shall be either by voice or a showing of hands at the option of the Chair. If the Chair is in doubt, he shall call for a division by a standing vote.

(B) A roll call vote (a vote by each delegate in accordance with his voting strength as shown on his credential) may be ordered by the Chair or upon the request of a two-thirds of the delegates present and voting provided this is done before any other business is taken up by the Convention. Once a roll call vote is ordered by the presiding officer, no recess shall take place nor shall any delegate be permitted to leave the hall until the result of the vote has been announced. The roll call list shall be the list of delegates present at the time roll is ordered as reflected in the most current report of the Committee on Credentials."

The presiding officer of the Convention, pursuant to the BRAC Constitution, was its President, Mr. C. L. Dennis. He conducted the consideration and voting on the proposed dues increase strictly in accordance with the Convention rules. This included extensive debate during which twelve delegates spoke, the submission of ten amendments, the reconvening of the Committee to consider and report on the amendments, a revised Committee recommendation of $11.00 per month dues effective July 1, 1971 ($4.20 to the Grand Lodge), and further debate during which an additional seven delegates spoke. The presiding officer put the proposal to a vote only when it was clear that no one else wished to speak and the Convention had unanimously called for a vote. (Petitioners' Appendix, 11-26.)[2]

The BRAC Constitution required a two-thirds vote of delegates present and voting for a dues increase.

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[2] The verbatim printed transcript of the Convention proceedings, attached as Exhibit 2 to the affidavit of Mr. Dennis (Petitioner's Appendix, 4), is of record in the case.

Most of the Convention delegates had only one vote, but some delegates from larger lodges had more than one vote. The delegates were seated at numbered tables on a flat surface grouped with the delegates from a particular carrier seated at the same table. Thus, delegates from large properties representing a substantial number of members were seated together. The presiding officer stood at a rostrum several feet above the Convention floor and knew the location of the groups and their voting strength. All of the other 320 votes of the Convention had been by a show of hands in accordance with the Convention rules. In some cases, the presiding officer had exercised his discretion under the rules to call for a further standing vote. In one instance, there had been a recorded roll call vote when the Chair was unable to declare a vote count. The presiding officer, therefore, called for a vote on the proposed dues increase by a show of hands and then exercised his right to call for a standing vote. He then declared the Committee's revised dues recommendation adopted by a two-thirds vote. The presiding officer's ruling was challenged by a delegate and the challenge was put to a standing vote in accordance with the Convention rules and failed to carry. No challenge was made of the declaration of the vote on such challenge.[3] No subsequent request for reconsideration was made during the Convention. (Petitioner's Appendix, 11-26; Respondents' Appendix, 101.)

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[3] Several minutes later, while the Convention was engaged in voting on a subsequent unrelated matter, a delegate inquired of the presiding officer as to whether he should have vacated the chair on the challenge to the vote on the dues increase. The presiding officer correctly replied "No" to this out of order inquiry. (Petitioners' Appendix, 25).)

The original complaint and amendments were filed in the United States District Court for the Eastern District of Pennsylvania. The case was transferred by order of that Court to the judicial district for the Northern District of Illinois on the basis of the venue requirements of Section 102 of the LMRDA. *Rota* v. *Brotherhood of Railway and Airline Clerks, et al.*, 338 F.Supp. 1176. The respondents submitted their case to the District Court on a motion for summary judgment on the issue of liability and the petitioners filed a counter-motion on such issue.

The thrust of the complaint, as well as of respondents' motion, alleged shortcomings in the Convention procedures. In essence, respondents claimed that the Convention rules were arbitrary and unreasonable, that the rules had not been complied with, and that the Federal Constitution, the LMRDA, and the BRAC Constitution[4] required a recorded vote on the dues increase. (Respondents' Appendix, 3.) Petitioners' position was that the Convention rules were unanimously adopted by the Convention and that respondents lacked standing to attack such rules; that such rules were of long standing dating back at least to the 1951 Convention; that the rules constituted reasonable and valid rules for such a Convention; and that neither the statutory language nor the legislative history thereof justified engrafting thereon a requirement for a roll call vote. Respondents opposed the petitioners' counter-motion for summary judgment on the same grounds on which their motion was based and also contended that three affidavits filed in the proceeding

[4] The District Court in Philadelphia restricted the case to one under Section 101(a)(3)(B) of the LMRDA. *Rota* v. *BRAC, et al.*, 338 F.Supp. 1176, at pages 1178 and 1179.

raised a question of fact as to whether "sufficient votes necessary to enact the challenged dues increase were not obtained".[5] The answer did not claim that the complaint, as amended, contained such allegation and, in fact, it did not, as the District Court found. (Respondents' Appendix, 5, 7; Appendix "B", 16a.) The District Court rejected respondents' contentions and granted the counter-motion of BRAC et al. for summary judgment. (Petitioners' Appendix, 135.)

The Court of Appeals did not accept the validity of respondents' attack on the Convention voting procedures, yet it reversed the decision of the District Court. The Court of Appeals found (1) that the statute required a majority vote for a dues increase at a regular union convention such as is here involved; (2) that the statute does not undertake to specify procedures for voting, but does require a reliable count thereof; (3) that, although respondents' attack in the District Court focused on the Convention procedures and a claim of doubt as to a two-thirds vote, affidavits submitted by respondents were sufficient to raise a question of fact as to whether the dues increase was carried by a majority vote; and (4) that, therefore, the burden rested on the petitioners to demonstrate unambiguously to the District Court compliance with the statutory requirement. The decision cited only three affidavits in support of this conclusion, none of which stated flatly that the statutory requirement of a majority vote had not been met. The affidavit of Mr. Browne expressed such a belief; that of Mrs. McCann "estimated about fifty-fifty"; and that of Mr. Win-

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[5] Actually, only one of these affidavits (that of Mr. Michael T. Browne) made any such claim and that affidavit merely expressed a "belief". ("Respondents' Appendix, 119-124.)

chester[6] talked of such a "possibility."[7] Nor does the decision specifically find that the amended complaint contained an allegation that a majority vote was not obtained. (Appendix "A" hereto, 7a-8a.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with this Court's interpretation of the voting requirements of Section 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act with respect to a dues increase of a national union

In *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, this Court interpreted the voting requirements of Section 101(a)(3)(B)(i) of the LMRA as not prohibiting a weighted voting system. In so doing, the Court declared (page 181) that it was abundantly clear that the statute was intended to guarantee a member's right to participate in deciding upon the vote of dues, "but not to bar a well-known system of voting embodied in many union constitutions which well serves that end". In the present case, the voting by the BRAC Convention on the proposed dues increase was conducted by a well-known system used for voting at prior Conventions over a long period, unanimously adopted by the Convention delegates, and consistent with the BRAC Constitution and parliamentary rules.

Section 46 of Robert's Rules of Order, covering voting, reads in pertinent part as follows:

> "The usual method of taking a vote is *viva voce* (by the voice). The rules require this method to

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[6] Respondents cancelled an earlier notice to take Mr. Winchester's deposition.

[7] The affidavits on their face contain many factual errors and engage in speculation concerning matters of which the individuals could not have knowledge.

be used in Congress. In small assemblies the vote is often taken by 'show of hands', or by 'raising the right hand' as it is also called. The other methods of voting are by rising; by ballot; by roll call, or 'yeas and nays', as it is also called; by general consent; and by mail. In voting by any of the first three methods, the affirmative answer *aye,* or raise the right hand, or rise, as the case may be: then the negative answer *no,* or raise the right hand, or rise.

"The responsibility of announcing, or declaring, the vote rests upon the chair, and he, therefore, has the right to have the vote taken again, by rising, if he is in doubt as to the result, and even to have the vote counted, if necessary. *He cannot have the vote taken by ballot or by yeas and nays (roll call) unless it is required by the rules or by a vote of the assembly.*" (Emphasis supplied.)

The Section also provides that after a decision any member may call for a count, the chair must put the question on ordering a count or roll call vote which requires a majority vote unless the assembly has a special rule. The Convention rules likewise provided for voting by a show of hands followed, at the discretion of the presiding officer, by standing and/or by a recorded vote. The count could be challenged and a motion made for a recorded vote upon which the Convention acts. Similar rules existed and were employed in the *Wittstein* case.

The voting here involved on the proposed dues increase and the presiding officer's actions were in accord with this procedure and the Convention rules. The respondents recognized this fact by focusing their attack on the Convention procedures and claiming that

the statute required a recorded or roll call vote.[8] There was no merit to this proposition, which was not accepted by either the District Court or the Court of Appeals, because it is not supported by any decision,[9] by the statutory language, legislative history, or comparison with other provisions of the statute,[10] and would produce unreasonable results. Yet, the decision below invalidates the legally declared result and in effect imposes a requirement of a recorded vote which could not be imposed directly by holding that there must be a showing of the actual vote by petitioners long after the fact through discovery of the delegates. It is respectfully submitted that this decision conflicts with the interpretation of the statutory intent set forth by this Court in the *Wittstein* case.

Such decision also conflicts with the decision of this Court in *Calhoon* v. *Harvey,* 379 U.S. 134, 145, against judicial interference in the internal affairs of unions except where clearly required cited by the District Court. (Appendix "B", 15a.)

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[8] This was done within the framework of a strictly *ad hominem* attack on the presiding officer and his motives which was wholly unsupported by the record of the Convention proceedings.

[9] A standing vote on a dues increase by delegates at a regular union convention was also found to be valid under the LMRDA in *White* v. *King,* 319 F.Supp. 122, 125 (D.C. La., 1970).

[10] Among other considerations, the Regulations of the Secretary of Labor for interpretation of the election procedures of Section 481 of the LMRDA similar to Section 101(a)(3)(B) provide that in the election of officers of a national or international labor organization elected at the convention of delegates chosen by secret ballot "the manner in which the vote of delegates is cast is not subject to special limitations".

2. The decision below involves an important issue in the interpretation and application of the Labor-Management Reporting and Disclosure Act

In the *Wittstein* case, this Court stated (page 175) that the interpretation of the statutory provisions for voting on a union dues increase there involved "being an important one of first impression under the LMRDA, we granted certiorari". The present case also presents an important issue under the same statutory provision. Here, the vote was taken in accordance with long established Convention rules based on recognized principles of parliamentary procedure and the presiding officer declared the result as he was required to do by those rules as well as by Robert's Rules of Order. The result was challenged and such challenge was put to a vote in accordance with Convention rules and clearly failed.[11] Neither the District Court nor the Court of Appeals agreed with the respondents' attack on those rules and the procedures used. Yet, on the basis of three affidavits of an uncertain, contradictory, and speculative nature, representing only .0024% of the Convention delegates, who were not in a physical position to observe the vote and had no knowledge of the distribution of delegates on the Convention floor, the decision below invalidates the result and requires that the petitioners, more than two and a half years after the Convention, must prove the actual count. It is submitted that this decision involves an issue with respect to the interpretation and application of the LMRDA that is of such importance to the public interest that it should not be left to stand without review by this Court:

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[11] The amended complaint does not claim otherwise nor do any of the affidavits filed by respondents. (Respondents' Appendix, 5, 103-104.)

First: the effect of the decision is to require a roll call vote on a dues increase by a regular convention of a national union to insure its validity under the LMRDA. Every union convention would have to vote in this manner if the validity of the vote could be subject to judicial review on the basis of a miniscule number of affidavits from dissenting delegates. The issue of whether the statute requires a roll call vote should be faced and acted upon directly by the Courts. Such a requirement should not be engrafted upon the statute through the back door in a situation where the argument for such requirement has been the primary basis of the respondents' suit but has not been accepted.

Second: there can be no assurance of accuracy in an *ex post facto* count of the vote at this time. In the intervening two and one-half years since the Convention, there will have been deaths among the delegates and there may well be retirements and changes of residence which will make delegates unavailable. There is also a serious question of the accuracy of memory of a delegate at this time with respect to one vote out of the more than 300 votes taken at the Convention, including the many votes taken on the subject of initiation fees and dues, including proposed amendments. Finally, the accuracy of present recollection may clearly be affected by the impact on a delegate of subsequent events which he or she either supports or opposes.

Third: the decision below puts in serious jeopardy the financial ability of this union to carry out its public responsibilities under the Railway Labor Act. The affidavits of the BRAC Secretary-Treasurer filed with the Court of Appeals in opposition to motions of respondents to escrow the amount of the dues increase

pending final resolution of the case show that without the dues increase the Grand Lodge of BRAC would have to cease many activities in which it is engaged to protect the jobs, wages, and working conditions of its members. These employees, a substantial number of whom, even on the basis of respondents' claims, favored the dues increase, should not be subjected to the risks inherent in the decision below that their representation will be cut off on the basis of a handful of affidavits of dissenting delegates. These affidavits also show that each of the individually named respondents has received wage increases through the expenditure by the Grand Lodge of such dues of many thousands of dollars far in excess of the amount of the dues increase.[12]

3. The decision below shifts the burden of proof from respondents to petitioners in conflict with established principles reflected in decisions of Federal Courts

The decision below, upon the basis of a handful of individual affidavits, places the burden of proof on BRAC to establish in the District Court that the vote count met the statutory requirement. This holding is contrary to the well established principles enunciated by decisions of Federal Courts holding that plaintiffs seeking judicial help have the burden of furnishing evidence in support of the material allegations of a complaint. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 60 (3rd Cir., 1949), aff'd 337 U.S. 498; *A.L.B. Theatre Corp.* v. *Loew's, Inc.*, 355 F.2d 495, 502 (7th Cir., 1966).

[12] BRAC has received in the form of a per capita tax on the Local Lodges through October, 1973, approximately $8,743,698 from the dues increase or $154 per member. The named respondents will receive wage increases as employees of REA Express exceeding $9,000 per person for the period July 1, 1971, to December 31, 1975.

The holding specifically conflicts with the decision of the Third Circuit in *Lewis* v. *American Federation of State, County and Municipal Employees,* 407 F.2d 1185, at page 1187 (1969), *cert. den.* 396 U.S. 866, holding that the burden of proof rested on plaintiffs in a suit alleging violations of provisions of Section 101 of the LMRDA. Nor can respondents argue that the decision below is justified on the basis of the claim that the material facts are peculiarly within the knowledge of petitioners. The decision states that such facts can readily be developed by appropriate discovery and stipulations. (Appendix "A", 13a.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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November, 1973

APPENDIX

The holding specifically conflicts with the decision of the Third Circuit in *Leone v. American Federation of State, County and Municipal Employees*, 407 F.2d 1180, at page 1187 (1969), *cert. den.* 396 U.S. 960, holding that the burden of proof rested on plaintiffs in a suit alleging violations of provisions of Section 101 of the LMRDA. Nor can respondents argue that the decision below is justified on the basis of the claim that the material facts are peculiarly within the knowledge of petitioners. The decision states that such facts can readily be developed by appropriate discovery and stipulations. (Appendix "A", p. 8a.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the [illegible] Circuit.

APPENDIX

APPENDIX A

Decision and Judgment of Court of Appeals

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972

APRIL SESSION, 1973

No. 73-1030

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al.,
Plaintiffs-Appellants

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 914

RICHARD W. MCLAREN, *Judge.*

ARGUED MAY 23, 1973—DECIDED OCTOBER 1, 1973

Before CLARK, *Associate Justice* *, CASTLE, *Senior Circuit Judge, and* STEVENS, *Circuit Judge.*

STEVENS, *Circuit Judge.* Plaintiffs challenge a ruling by the president of the Brotherhood of Railway, Airline and

* The Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, retired, is sitting by designation.

Steamship Clerks that a dues increase from $5.50 to $11.00 had been approved by the 1,235 delegates to a regular Union Convention on May 28, 1971. The district court entered summary judgment for defendants, holding that the undisputed facts showed that the increase had been approved by a majority vote as required by § 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U.S.C. § 411(a)(3)(B)(i), and that the question whether the two-thirds requirement in the Union Constitution had been met related only to internal Union affairs which a federal court has no power to review. We believe there is sufficient confusion in the record on the question whether a majority voted in favor of the increase to preclude the entry of summary judgment.

The Convention was attended by 1,235 delegates representing about 200,000 Union members. The Union Constitution, which could be amended at a regular Convention by a two-thirds vote of the delegates present and voting, specified minimum monthly dues of $5.50 per member. In advance of the 1971 Convention, a number of proposals for increasing the dues were mailed to the delegates.

At the opening session of the Convention on Monday, May 24, 1971, procedural rules were adopted,[1] and various

[1] Rule 14 covered the procedure for voting by delegates:

"Rule 14. (A) The manner of voting shall be either by voice or a showing of hands at the option of the Chair. If the Chair is in doubt, he shall call for a division by a standing vote.

"(B) A roll call vote (a vote by each delegate in accordance with his voting strength as shown on his credential) may be ordered by the Chair or upon the request of a two-thirds [sic] of the delegates present and voting provided this is done before any other business is taken up by the Convention. Once a roll call vote is ordered by the presiding officer, no recess shall take place nor shall any delegate be permitted to leave the hall until the result of the vote has been announced. The roll call list shall be the list of delegates present at the time roll is ordered as reflected in the most current report of the Committee on Credentials." Brief for Appellants at 9.

matters, including the subject of a dues increase, were referred to appropriate committees. On Friday afternoon the Convention Committee on Grand Lodge Constitution and Laws made its report, recommending an increase in dues to $10.00 effective July 1, 1971, and to $12.00 effective July 1, 1973, with a specified allocation among local lodges, system boards, and the Grand Lodge. Opposition to the allocation, to the amount of the increase, and to the two-step procedure developed. After a number of amendments were proposed, the subject was resubmitted to the Laws Committee for further consideration.

At the evening session the Committee submitted a report recommending an increase to $11.00 effective July 1, 1971. Again opposition developed on the floor of the Convention; amendments were proposed and either voted down or rejected for procedural reasons. The Chairman spoke in favor of the increase, gave other delegates an opportunity to speak for and against, and then called for a vote. The transcript of the proceedings then reflects the following:

> We will now vote on the Committee's report, and the Committee's report was that the dues shall be $11.00 and the Grand Lodge portion would be $4.20 a month; the System Board portion $4.20; and the Local Lodge portion $2.60, with the understanding, as I stated previously, any General Chairman who thinks he does not need that much money can write in and get forgiveness from the International President.
>
> Are you ready to vote?
> . . . Calls for the question . . .
>
> INTERNATIONAL PRESIDENT DENNIS: Those in favor of the Committee's report please raise your right hands. Down hands. Those opposed.
>
> Well, let's see if we can see a little better by a standing vote. Those in favor of the Committee's report please rise.

... Those in favor of the motion arose ...

INTERNATIONAL PRESIDENT DENNIS: Everybody rise who is in favor of the Committee's report, and we will have the Tellers tabulate their particular tables. It looks to me like we have two-thirds.

.... Cries of "Oh" and applause ....

INTERNATIONAL PRESIDENT DENNIS: This is the Committee's amended report. You see, the TC Division over on this side of the house only has a half a vote.

... Cries of "Roll call ..."

INTERNATIONAL PRESIDENT DENNIS: And I will bet my right arm that there's two thirds of the Delegates standing.

... Cries of "No" and "Roll call" ...

INTERNATIONAL PRESIDENT DENNIS: Now we are not going to gain anything by a lot of hollering. I will do what this Convention wants me to do. I am trying to be fair and honest about this thing. I could very easily say that this is a two-thirds vote.

So now, if anybody wants to get a little rough with the Chair, the Chair in turn will get a little rough with them. (Applause)

Now, I have tried to be considerate. (Applause)

I now declare we have a two-thirds vote standing. (Applause and cheers) And this is the ruling of the Chair. (Applause and cheers)

DELEGATE TOPPEN: Committee Report No. 5, page 4, Resolution No. 7, page 4.

DELEGATE F. M. SHEAHAN (TC Division 1): Mr. Chairman. Mr. Chairman.

INTERNATIONAL PRESIDENT DENNIS: What is the problem?

DELEGATE SHEAHAN: Point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State it.

DELEGATE SHEAHAN: I have a point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State your point.

DELEGATE SHEAHAN: I wish to challenge the Chair on the vote. (Applause and cheers)

DELEGATE JOAN D. BRDA (Lodge 36): I second the motion. (Applause)

INTERNATIONAL PRESIDENT DENNIS: All right. If two-thirds of the Delegates challenge the decision of the Chair, we will then have a roll call vote. (Applause)

Now, those delegates who wish to challenge the decision of the Chair please rise.

. . . Those who wished to challenge the decision of the Chair arose . . .

INTERNATIONAL PRESIDENT DENNIS: That is not two-thirds of the house. (Applause and cheers)

The decision of the Chair stands.[2]

A few minutes later another delegate challenged the action of the President for not vacating the chair when the vote had been challenged.

---

[2] Proceedings of the 24th Regular and Tenth Quadrennial Convention of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees Held at Miami Beach, Florida Fountainebleu Hotel Friday and Saturday, May 28, 29, 1971, pages 303-304. 304.

INTERNATIONAL PRESIDENT DENNIS: Mike 2.

DELEGATE VICTOR F. LAGONIA (TC Division 17): Mr. President, a point of information. The delegate from the Canadian division appealed the decision of the president. Should not the president vacate the Chair and have some one other than him make another decision of the same one?

INTERNATIONAL PRESIDENT DENNIS: If I would have a two-thirds vote sustaining that delegate, I would have relinquished the Chair.

DELEGATE LAGONIA: You made the two-thirds decision twice.

INTERNATIONAL PRESIDENT DENNIS: Yes. And that stands.

DELEGATE LAGONIA: Well, I do not think that is according to Robert's rules.

INTERNATIONAL PRESIDENT DENNIS: Well, I think it is according to our convention rules, Brother. And our Convention rules prevail, except where we have no rule to cover, and then we go to Robert's.[3]

The record of the Convention proceedings does not disclose any attempt to ascertain the actual count of votes. The first vote on the dues increase was by a show of hands and the second by a standing vote. Apparently in both instances the chair made the determination, without the assistance of tellers, that the motion had carried. He also rejected the appeal from his decision on the basis of his own determination that the show of hands did not represent a two-thirds vote. The reliability of his determination may reasonably be questioned because he was an advocate of the increase, because a visual scan of over

[3] Proceedings, pages 304-305.

1,000 persons in a large hall is imprecise at best and, in addition, because the votes of many delegates were weighted.

After the Convention adjourned, 165 delegates "requested the International President to have their names recorded against the dues increase for many and varied reasons." The significance of this request is unclear.

On June 21, 1971, plaintiffs, suing on behalf of "similarly situated" Union members, commenced this action in the United States District Court for the Eastern District of Pennsylvania. That court held that an amended complaint attacking the dues increase stated a cause of action, but that venue was improper. The case was therefore transferred to the Northern District of Illinois where defendants' motion for summary judgment was granted.

The record includes the pleadings, the printed transcript of the Convention Proceedings, and various affidavits. The amended complaint challenges both the Convention procedures and the results of the vote on the dues increase. It alleges in paragraph seven:

> "d) The membership of Victory Lodge 2151 was clearly opposed to such a drastic increase in dues, as was the majority of BRAC members who make up the class of plaintiffs in this action. A majority of the delegates also clearly opposed a dues increase of 100%. Chairman Dennis, however, was on record throughout the convention as being in favor of the dues increase. Chairman Dennis furthermore improperly induced certain Canadian delegates to vote in favor of the increase.
>
> "e) Chairman Dennis refused to conduct a roll-call vote of the delegates on the issue of the dues increase despite repeated requests from the delegates that a roll-call vote on this important issue be taken.

Even in the standing vote of the delegates which Chairman Dennis purported to conduct, which could not reflect the true voting powers of the delegates, considerably less than two-thirds of the delegates voted in favor, as required at the very least by the BRAC constitution. Instead, Chairman Dennis used threats and intimidations from the chair in an effort to silence debate and dissent and then 'gavelled through' the matter without any effort to determine by written ballot or roll call where each delegate stood on this closely contested issue, or to accurately determine the actual vote of the convention."

The affidavits filed with plaintiffs' opposition to defendants' motion for summary judgment, when read with the printed record of Convention Proceedings, raise a factual question as to whether the dues increase was passed by a weighted vote of a majority of the delegates. Thus, the McCann affidavit stated, in part:

"The next motion was to raise the dues a flat $5.00 [sic] effective July 1. There was a discussion on the floor. The Canadian delegates bringing up the issue of a competitive union in their vicinity and explaining they would lose members. Brother Dennis informed them there would be an adjustment made in their locality so they need not be concerned. These Canadian delegates were still permitted to vote, although they were previously informed they would not be affected.

"The first vote was raising of hands. From my position I ascertained the vote as approximately fifty-fifty. Brother Dennis ruled the motion was passed. There was much groaning and dissension among the delegates.

"The next vote was taken by the delegates standing up from their seats.

"My observation was that about the same delegates that raised their hands pro and against now stood and sat down. I again estimated about fifty-fifty.

"Brother Dennis spent a minute or two looking around and again ruled the motion passed and the dues were raised $5.00 additional.

"Again there was much dissension from the floor and protests registered. Brother Dennis ruled the motion stood as the chair ruled.

"Many delegates walked out in disgust.

"In fact, the issue was brought up again the following day and ruled out of order irritating Brother Dennis very much.

"Inasmuch as delegates had varied voting strength, depending on the size of the Lodge or Lodges, they represented, it would be literally impossible to accurately determine the exact voting power exercised either way by the method used.

"All I can determine is that about half the delegates stood for the raise and about half the delegates stood against the raise. This was my own estimate from my vantage point in the rear of the auditorium." A.48-49.

The Browne affidavit states:

"I do not believe it was a simple majority let alone a Two Thirds Majority as required by our constitution, therefore I felt and still feel that a roll call vote should have been taken." A. 120.

The affidavit of W. B. Winchester states, in part:

"I was present and on the floor at the time the vote for a 100% dues increase was taken, it would raise the minimum dues from $5.50 to $11.00 per month. I

was shocked at the high-handed and unfair procedures which took place.

"The Chairman asked those in favor of the committee's report to please raise their right hand. There were only a few hands raised, not nearly half of the room raised their hands in favor of the dues increase. He then asked for those who were opposed to raise their right hands and more than ⅔ of the delegates in the room raised their right hands. Chairman Dennis, at this point, saw that the dues increase was lost and immediately called for a standing vote to see if he could determine a little better how the vote went. He asked for those in favor of the committee's report to rise. Only a small percentage of the delegates rose. He then asked for the delegates in favor of the committee's report to rise and 'we will have the tellers tabulate their particular tables' and stated 'it looks to me like we have ⅔rds'. The tellers did not tabulate the delegates at each table because immediately Mr. Dennis and his parliamentarian discussed this procedure and both of them realized that a tabulation of each table would be about the same as a roll-call vote.

* * *

"I was seated in a part of the room where I had a good opportunity to observe the procedures used in taking the vote and to see for myself how the delegates voted. I heard Chairman Dennis claim that a two-thirds majority had been obtained in support of the dues increase. This was just not so, and I was deeply disturbed by the Chairman suggesting that such a majority had been obtained. Immediately after the vote, I checked with the other members who were at the Convention and asked their opinion as to whether there was any possibility that I had misread the vote. The feelings of those with whom I spoke was almost unanimous that a two-thirds majority and

possibly not even a simple majority was received in support of the dues increase. Chairman Dennis knows, to be truthful, that he did not receive the majority of the vote, I know it, and all those who were delegates at the Convention know it; . . ." A. 132-134.

The affidavits submitted by plaintiffs are sufficient to raise a question of fact as to whether the dues increase was carried by a majority vote. Although the plaintiffs' attack in the district court focused primarily on the alleged shortcomings in Convention procedures, together with the claim that there was substantial reason to doubt that the two-thirds vote required by the constitution was obtained, we think it was error to interpret plaintiffs' position as, in effect, conceding that a majority vote favored the dues increase.[4] Plaintiffs' allegations and affidavits were sufficient to require defendants to demonstrate unambiguously that the requirement of the federal statute had been satisfied.

There is, of course, a general national policy against judicial interference in the internal affairs of unions. See *Calhoun* v. *Harvey*, 379 U.S. 134, 145 (Mr. Justice Stewart concurring); *Gurton* v. *Arons*, 339 F. 2d 371, 375 (2d Cir. 1964). But that general policy is subject to important exception in specific areas in which Congress has found that the interests of individual members need special protection against the danger of overreaching by entrenched union leadership.[5] The subject of dues increases is such an area.

Congress has specifically required a secret ballot procedure for local labor organizations[6] and, with respect to

---

[4] In its Memorandum Opinion and Order the district court stated: "Plaintiffs do not contend that the challenged increase was not approved by a majority vote of the delegates voting." A. 138.

[5] See *Wirtz* v. *Bottleblowers Assn.*, 389 U.S. 463, 473, 475; *Hall* v. *Cole*, — U.S. —, 41 U.S.L.W. 4658, 4659 (May 21, 1973).

[6] See 29 U.S.C. § 411(a)(3)(A).

national or international organizations, a majority vote at a regular convention, or a majority vote at a special convention held with adequate notice of the dues increase issue.[7] The statute does not undertake to specify the procedures that must be followed in voting on a dues increase. Necessarily, however, the word "vote" connotes a fairly determined expression of the will of the union membership and a reliable and accurate count thereof. Since Congress has deemed the subject of dues increases sufficiently important to require statutory controls, it is also sufficiently important to require the union to demonstrate unambiguously that the statutory requirement has been met.

Since the record of the Convention proceedings fails to demonstrate that the majority vote requirement of § 101 (a)(3)(B) of the Act was satisfied, that issue must be resolved by trial.[8]

Plaintiffs have raised additional issues which we need not decide. Assuming the statutory requirement of a

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[7] The relevant portion of the statute provides:

> "Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> * * *
>
> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice. . . ."

[8] The fact that plaintiffs had filed their own motion for summary judgment is not inconsistent with the position that there are genuine factual issues. See *M. Snower & Co.* v. *United States*, 140 F.2d 367, 369-371 (7th Cir. 1944); *Begnaud* v. *White*, 170 F.2d 323, 327 (6th Cir. 1948).

majority vote has been satisfied, the question whether the Union constitution has been breached raises issues of state law. Under the doctrine of pendent jurisdiction, there is no doubt that the federal district court would have power to decide such issues and, if appropriate, to grant relief. *United Mineworkers of America* v. *Gibbs*, 383 U.S. 715, 725. But whether the district court should exercise that power is another question which should be addressed by that court in the first instance. We merely decide that it was error to enter summary judgment. After the actual weighted vote has been determined [9] it will be time to face whatever issues may remain for decision.

---

[9] We assume that most of the critical facts can readily be developed by appropriate discovery and stipulations, under the supervision of the district court, and that the trial need not include the testimony of 1,235 witnesses.

REVERSED AND REMANDED

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Decision and Order of District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 72 C 914

HENRY L. ROTA, ET AL, *Plaintiffs*,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL, *Defendants.*

Memorandum Opinion and Order

This action on behalf of the members of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees against the international union was transferred to this district by the district court for the Eastern District of Pennsylvania. The matter is now before this Court upon cross motions for summary judgment.

The material facts are not in dispute. In November and December 1970, the members elected delegates to the international union's Twenty-Fourth Regular and Tenth Quadrennial Convention. During its first session, the convention approved nineteen proposed rules of procedure. Rule 14 provided, *inter alia,* that voting would be either by voice or a showing of hands, at the option of the Chair, or if the Chair was in doubt, by a standing vote. A roll call would be held only by order of the Chair or upon the request of two-thirds of the delegates present and voting.

On the last full day of the convention, a motion was presented to amend the union constitution to increase dues. After the motion was returned to committee for further

study, an amended version was presented. The Chair first held a vote by the raising of hands. When this was inconclusive, he held a standing vote and declared that the motion had been passed by the required two-thirds vote of the delegates voting. When challenged on the vote, the Chair conducted another standing vote and declared that a roll call would not be made because it had not been requested by two-thirds of those voting.

Plaintiffs contend that the dues increase was unlawful because the procedures and actions described above violated the Labor-Management Reporting and Disclosure Act, commonly known as the Landrum-Griffin Act, 29 U.S.C. §§ 401 *et seq.*[1]

The Court notes preliminarily that it is aware of the general national policy against interference by the courts in internal union disputes (*Calhoon* v. *Harvey*, 379 U.S. 134, 145 (1964) (Stewart, J., concurring); *Stettner* v. *International Printing Pressmen and Assistants' Union of North America*, 278 F.Supp. 675, 676 (E.D.Tenn. (1967)), and that the Landrum-Griffin Act was not intended to change this policy. *Williams* v. *International Typographical Union, AFL-CIO*, 423 F.2d 1295, 1297 (10th Cir. 1970); *Gurton* v. *Arons*, 339 F.2d 371, 375 (2d Cir. 1964).

Plaintiffs base their claims upon 29 U.S.C. § 411(a)(1) and (a)(3). Insofar as their arguments are based upon § 411(a)(1), they are clearly untenable, notwithstanding language in the transferring judge's opinion denying defendants' motion to dismiss. This case presents issues as to the propriety of actions taken at a regular convention of the international union. Section 411(a)(1) pertains only to the rights of members to nominate candidates, vote in

[1] Although plaintiffs also contend that these activities violated the Due Process Clauses of the Fifth and Fourteenth Amendments, they have not pursued their constitutional claims in their memoranda and the Court has not considered them.

elections or referendums, and attend and participate in membership meetings. In drafting § 411, the "Bill of Rights" section of the Landrum-Griffin Act, Congress chose to deal with the manner of increasing dues at regular conventions specifically in § 411(a)(3)(B)(i). This Court will not stretch the language of subsection (a)(1) to cover the facts here where Congress has dealt with actions of this nature elsewhere.

Section 411(a)(3)(B)(i) provides in pertinent part:

> "the rates of dues . . . payable by members . . . shall not be increased . . . except—. . . by a majority vote of the delegates voting at a regular convention. . . ."

Plaintiffs do not contend that the challenged increase was not approved by a majority vote of the delegates voting. Rather, they argue that the increase is not valid because, *inter alia,* Rule 14 was arbitrary in that it delegated to the Chair the power to determine whether a roll call was necessary; Rule 14 was not even followed; weighted voting was required on the increase and was not used; and even if weighted voting were used, the counting procedure was inherently defective.

They rely upon *American Fed'n of Musicians* v. *Wittstein,* 379 U.S. 171 (1964) for the proposition that § 411(a)(3)(B)(i) is intended to prevent arbitrary rules and actions related to dues increases. There the Court quoted Representative Griffin's observation that § 411 "guarantees to union members . . . that their dues and initiation fees will not be increased arbitrarily." *Id.* at 180. To interpret this to mean that all arbitrary action taken in regard to dues increases at conventions may be redressed in the courts would not only clash with the policy of non-interference in internal union matters, but would also leave the courts, the unions, and their members with the vague standard of arbitrariness to guide their actions. The Court will there-

fore accord Representative Griffin's statement its more obvious meaning—that arbitrary increases would be prevented by the minimum requirements of the statute itself.

Plaintiffs also rely upon *Wittstein, supra,* for their contention that § 411(a)(3)(B)(i) requires weighted voting. That case did not decide that weighted voting is mandatory when dues increases are approved by conventions. Rather, the Court held that the statute does not *prevent* it, although a literal reading would seem to indicate otherwise. The Court did not even imply that compliance with the literal words was not permitted.

Plaintiffs' charges of violations of the union constitution in the procedure by which dues were increased need not be dealt with here because no violation of the statute's requirements has been shown. *Navarro* v. *Gannon,* 385 F.2d 512, 516 n. 6 (2d Cir. 1967); *Gurton* v. *Arons, supra* at 374. Nor will the Court examine the charge that the method used to count votes was inherently defective, since this claim assumes that weighted voting by a two-thirds vote, which plaintiffs contend was required by the union constitution, was required by the act as well. Section 411 (a)(3)(B)(i) does not incorporate the constitution's requirements by reference.

Because the Court finds no genuine issue as to the material fact that the dues increase was approved by a majority vote of the delegates voting at the convention, defendants are entitled to judgment as a matter of law. Accordingly, plaintiffs' motion for summary judgment is hereby denied and summary judgment will be entered for defendants.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. McLAREN

United States District Court

DATED: November 8, 1972

APPENDIX C

Rules of Order of BRAC Convention

Rule 1. Only delegates, International and TC Grand Division Officers, and members of the convention staff shall be allowed on the main floor.

Rule 2. The hours of the morning and afternoon sessions of the Convention shall be from nine-thirty a.m. until twelve noon and from two p.m. to five p.m., daylight saving time, daily, except for the opening session on Monday (this date) shall be from seven p.m. until no later than eleven-thirty p.m. daylight saving time. If it becomes necessary, night sessions may be held upon call of the International President, in which event the hours shall be from seven p.m. until adjournment, but not later than eleven-thirty p.m. daylight saving time.

Rule 3. All announcements must be submitted in writing to the International Secretary-Treasurer who will read the announcements of interest to the delegates.

Rule 4. Only delegates, International and TC Grand Division Officers, and persons invited by the International President shall be allowed the floor to speak on any question or to address the Convention.

Rule 5. All resolutions shall be filed with the International President who shall refer them to the proper committee for consideration and they shall be printed in the day's proceedings.

Rule 6. (A) No resolution shall be received after the close of the afternoon session Tuesday, May 25, 1971 except by two-thirds vote of the delegates.

(B) No appeal from the decision of the Executive Council shall be received after the close of the morning session Wednesday, May 26, 1971.

Rule 7. The order of business as provided by the Constitution, Article 7, Section 13, page 21 shall be followed each day so far as possible consistent with the needs to expedite the business of the Convention.

Rule 8. When a delegate desires to address the Convention he shall proceed to the nearest microphone and, after being recognized by the Chair, shall identify himself by name and the unit he represents as a delegate.

Rule 9. In order for a motion to be considered, it must be seconded. The mover of the motion as well as the seconder shall proceed to the nearest microphone and, after being recognized by the Chair, shall identify themselves by name and the unit they represent as a delegate.

Rule 10. A delegate shall not speak more than once for longer than five minutes on any motion or resolution before the Convention except that the maker of the motion shall be allowed five minutes additional time to close debate.

Rule 11. No delegate shall interrupt another in his remarks except for a point of order or a point of personal privilege. He shall definitely state the point and the presiding officer shall decide the same without debate. A point of order, once decided, cannot be renewed during the Convention.

Rule 12. If a delegate be called to order while speaking, he shall cease talking immediately until the question of order is decided. If the decision is that the delegate is in order, he may then proceed upon being so advised by the Chair.

Rule 13. A motion to amend a motion, or a motion to amend a proposed amendment to a motion shall be in order, but no motion to amend a proposed amendment to a proposed amendment shall be permitted. Whenever an amendment is offered from the floor which would effect a change of substance in any resolution, proposed amendment to the

Brotherhood's laws, or committee revision of the same then pending before the Convention, such floor amendment shall be in writing and may at the discretion of the presiding officer be referred to the appropriate committee for consideration and recommendation prior to any action by the Delegates on such proposed amendment.

Rule 14. (A) The manner of voting shall be either by voice or a showing of hands at the option of the Chair. If the Chair is in doubt, he shall call for a division by a standing vote.

(B) A roll call vote (a vote by each delegate in accordance with the voting strength as shown on his credential) may be ordered by the Chair or upon the request of a two-thirds of the delegates present and voting provided this is done before any other business is taken up by the Convention. Once a roll call vote is ordered by the presiding officer, no recess shall take place nor shall any delegate be permitted to leave the hall until the result of the vote has been announced. The roll call list shall be the list of delegates present at the time roll is ordered as reflected in the most current report of the Committee on Credentials.

Rule 15. Proposed amendments to the Constitution of the Grand Lodge, statutes for the government of lodges, and protective laws shall be acted upon without the requirement of three readings.

Rule 16. All references concerning the Constitution of the Grand Lodge, statutes for government of lodges and protective laws by any delegate on the floor shall be identified by Article, Section and page number for the ready reference of all delegates before comment is made thereon.

Rule 17. The International President shall appoint a committee of three to read the minutes of the last day's session of the Convention with authority to correct and approve same.

Rule 18. Any question of parliamentary nature not covered by these Rules of Order or the Brotherhood's Constitution and related laws shall be decided by Robert's Rules of Order.

Rule 19. Any of these rules governing the conduct of the Convention may be suspended by unanimous consent of the Delegates present and voting.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151,

Petitioners,

vs.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SORG/CHICAGO U.S.A.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-792

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS and G. E. STEPHENSON, General Chairman, Allegheny District Board of Adjustment of BRAC, and C. L. DENNIS, International President, Brotherhood of Railway, Airline and Steamship Clerks, and GEORGE A. SMITH, Secretary-Treasurer, Victory Lodge 2151, *Petitioners,*

VS.

HENRY ROTA, Individually and for other members of Victory Lodge 2151 of the Brotherhood of Railway, Airline and Steamship Clerks, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, a class [1] consisting of members of Brotherhood of Railway Airline and Steamship Clerks, an international union which is one of the petitioners (herein referred to as "petitioner union"), oppose the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 1, 1973.

[1] The suit was brought as a class action under Rule 23 of the Federal Rules of Civil Procedure by Henry Rota, a member of petitioner union, on behalf of himself, other members of Victory Lodge 2151, a local union of which he is a member, and, on behalf of all other similarly affected members of petitioner union.

REASONS FOR DENYING THE WRIT

1. Review Is Inappropriate Because Of The Interlocutory Nature of this Case Involving An Unresolved Material Issue of Fact.

An issue of material fact has been raised by the pleadings and affidavits as to whether the vigorously disputed proposed dues increase resolution[2] was carried by the statutorily required majority vote.[3]

The amended Complaint, in referring to the activities at the 1971 convention of petitioner union relating to the contested dues increase, alleged:

> "(d) the membership of Victory Lodge 2151 was clearly opposed to such a drastic increase in dues, as was the majority of BRAC members who made up the class of plaintiff in this action. *A majority of the delegates also clearly opposed a dues increase of 100%.*"
>
> "(e) . . . Instead Chairman Dennis issued threats and intimidations from the chair in an effort to silence debate and dissent and then *"gavelled through" the matter without any effort to determine by written bal-*

[2] The subject of this dispute is the 100% increase of union dues, from $5.50 to $11.00 per month, "gavelled through" by the president of petitioner union at the 1971 convention after his rapid visual scan of a standing vote of 1235 delegates possessing varying weighted votes; the increase is being collected from each member of the respondents' class every month since July 1971.

[3] The statute which is the basis of this action is Section 101 of the Labor-Management Reporting and Disclosure Act of 1959, commonly entitled the Landrum-Griffin Act, 29 U.S.C. 411, referred to herein as the Act.

lot or roll call where each delegate stood on this closely contested issue, or to accurately determine the actual vote of the convention.'' (Emphasis supplied.) (Appendix to Petition for Writ, pp. 7a-8a.)

The allegations of the complaint were amply supported by several affidavits of delegates to the convention, who were eye witnesses to the conduct of the "vote".[4] Petitioner has offered no evidence of any accurate and reliable vote count.

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[4] Following are sample excerpts from these sworn statements which dispute any majority vote in favor of the dues increase:

"Not nearly half of the room raised their hands in favor of the dues increase. He then asked for those who were opposed to raise their right hands and more than 2/3 of the delegates in the room raised their right hands." (Delegate Winchester, A. 107)

"I do not believe it was a simple majority." (Delegate Browne, A. 120)

"I remember that the opposing vote was taken and that we felt we had the edge." (Delegate Smith, A. 106)

"in favor . . . may not two-thirds at all, but actually less than fifty per cent." (Delegate Farley, A. 114)

"The delegates were equally divided and if anything those opposed held a slight majority." (Delegate Flaherty, A. 111)

"The same delegates who voted against it were the only ones who stood up when Chairman Dennis was challenged. And this in my opinion looked like 50% of the delegation." (Delegate Cooney, A. 108)

"About half the delegates stood for the raise and about half the delegates stood against the raise." (Delegate McCann, A. 122)

"It appeared to me to be only a 50-50 vote." (Delegate Brda, A. 115)

"I estimate that the vote was no more than 50-50." (Delegate Altman, A. 119)

"I contend that there was a 50-50 vote and not a 2/3 vote." (Delegate Marshall, A. 129)

References are to the Appendix filed with the Court of Appeals.

Because of this unresolved issue of material fact as to the number of votes favoring or opposing the dues increase, the Court of Appeals reversed the summary judgment order of the District Court and unanimously remanded for a trial stating:

> **"We believe there is sufficient confusion in the record on the question whether a majority voted in favor of the increase to preclude the entry of summary judgment . . . we merely decide that it was error to enter summary judgment. After the actual weighted vote has been determined it will be time to face whatever issues remain for decision." (Appendix to Petition for Writ, p. 2a)**

The net effect of the decision of the Court of Appeals is to deny the petitioners' motion to the District Court for summary judgment. The denial of a motion for summary judgment is a non-appealable, interlocutory ruling and not a final judgment in that the claim still remains pending for trial.[5] Clearly, therefore, in the language of this Court, the case "is not yet ripe for review by this Court."[6]

2. The Court of Appeal's Decision is in Full Accord With The Applicable Decisions of this Court

The Court of Appeals punctiliously adhered to this Court's decision in *American Federation of Musicians* v. *Wittstein,* 379 U.S. 171 (1964). The law enunciated in *Wittstein,* and urged by petitioners, was carefully observed by the Court of Appeal's decision, in its holding that:

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[5] *Switzerland Cheese Ass'n.* v. *Horne's Market, Inc.,* 385 U.S. 23 (1966); *Valdosta Livestock Co.* v. *Williams,* 316 F.2d 188 (C.A. 4, 1963); *Waller* v. *Professional Insurance Company,* 316 F.2d 729 (C.A. 5, 1963).

[6] *Brotherhood of Locomotive Firemen and Engineers* v. *Bangor and Aroostok Railroad Company,* 389 U.S. 327 (1961).

> "The statute[7] does not undertake to specify the procedures that must be followed in voting on a dues increase". [8]

The Court of Appeals did not specify, as petitioners contend, that a roll call vote was required. If the Court had reached such a conclusion, the contested dues increase would have been summarily set aside by the Court, by means of *reversing* the District Court, since the petitioners have admitted the increase was imposed upon the union membership without any such formal count. Instead, however, the Court *remanded* the matter to the District Court to determine the actual count of votes that was not obtained at the convention. There is no conflict with *Wittstein* which states:

> "We hold that Section 101 (a) (3) (B) does not prohibit a weighted voting system under which delegates cast a number of votes equal to the membership or the local union for which they are elected . . . the section *requires a majority vote of the delegates voting*". (Emphasis supplied.)

In *Wittstein,* the precise number of weighted votes, and the number of delegates casting them, were duly recorded and part of the record before the Court. The facts in *Wittstein* are thus vastly different from those in the instant case in which no count of votes or delegates ever has been accomplished.[9]

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[7] The statute referred to in *Wittstein* is the same Act which is the basis of the instant action.

[8] Appendix to Petition for Writ, p. 12a.

[9] Thus, consonant with *Wittstein,* the Court of Appeals has remanded the matter to the District Court for a determination of the conspicuously absent accurate count of votes.

Without explanation, petitioners erroneously allege that the decision of the Court of Appeals conflicts with *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). But *Calhoon* was not a suit involving a contested dues increase; it was a suit by individual union members seeking to require a change in the union constitution and by-laws to provide new rules of qualification for nomination for union office. This Court decided that such disputes "basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title" in action brought by the Secretary of Labor; *Calhoon* is therefore wholly inapposite to the instant case in which the complaint arises out of an alleged Title I violation. This Court apparently already has distinguished the matters of dues increases from matters of qualification for union office by deciding the merits of the controversy in *Wittstein*, and dismissing the action in *Calhoon*.

3. The Evidentiary Rules Enunciated by the Court of Appeals Comport with Traditional Doctrine.

A majority vote favoring the dues increase must be proven to support such an increase because the Act has been drafted as a prohibition against increases in union dues, *except* by majority vote. The usual rules of statutory construction require that the legality of acting in a statutorily circumscribed area must be established by a showing that it was accomplished by means within a stated

exception.[10] The decision below applied the usual rule in holding that petitioners, to obtain the benefit of the statutory exception, would have the burden of proving a majority vote.[11] Such burden is particularly appropriate since the facts necessary to be proved are peculiarly within petitioners' knowledge:[12] petitioners alone have the names of the delegates, the votes each delegate possessed at the convention, and according to the allegations of petitioners, how

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[10] See *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Railway Company,* 205 U.S. 1, (1907) holding (at p. 10): "The general rule of law is that a provision carves special exceptions only out of the body of the Act; and those who set up any such exception must establish it . . . The rule applied to construction is applied equally to the burden of proof in a case like this."

[11] *S.E.C.* v. *Ralston Purina,* 346 U.S. 119 (1953), citing *Schlemmer,* note 10 *supra,* states: "Keeping in mind the broadly remedial purposes of Federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."

[12] This proposition is called the Rule of Inconvenience and is stated in 20 *Am Jur* 145, Evidence, Section 140: "The broad rule prevails that the omission by a party to produce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his control, raises the presumption that the testimony, if produced, would be unfavorable to his cause. In such case the burden of coming forward with proof is upon the party who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge or of which he is supposed to be cognizant," See also, *New York C. & H. R.R. Co.* v. U.S., (C.A. 1, 1908) 165 F. 833.

each delegate voted.[13] Further, it was petitioners who conducted the vote and who should be responsible for establishing the results thereof by a reliable and accurate count.

Respondents have established their right under the Act to be free from an arbitrary imposition of a dues increase and raised a genuine issue of the material fact as to the count of the votes on the question. The evidentiary rulings below, holding that petitioners, who conducted and controlled the proceedings which they allege to comply with a statutory exception, have the burden of establishing compliance with the statutory provision, are not in conflict with the decision of any Circuit and, indeed, are in harmony with those cases cited by petitioners.[14]

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[13] Petitioners allege in its Petition (p. 13) that respondents "were not in a physical position to observe the vote and had no knowledge of the distribution of delegates on the convention floor."

[14] Not at all contrary to the holding below is the case cited by petitioners, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 60 (C.A. 3, 1949) aff'd 337 U.S. 498, in which the Court held that in a suit by an administrative agency, the agency must establish that it has been "given rights or powers for which sanctions are being sought" in a judicial proceeding. *A.L.B. Theatre Corp.* v. *Loews, Inc.* (C.A. 7, 1966), 355 F.2d. 495, also has been cited by petitioners; it stands for nothing beyond the general proposition that the party having an affirmative of an issue and failing to prove it will not prevail even absent countervailing evidence.

CONCLUSION

This Factual Dispute Between The Parties Does Not Involve Any Important Legal Issues.

The factual issue as to whether an appropriate number of votes supported a dues increase is momentarily important to the parties but not an important issue of federal law. The decision below merely restates the well established proposition that a vote has been required by statute as a safeguard against unscrupulously and tyranically imposed dues increases.[15] An order requiring the petitioners to overcome a deficiency in their procedures which omitted any accurate or reliable count of votes is not an unusual

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[15] Providing protection against abuses by union leadership in increasing dues was the precise reason for the passage of the section of the Act involved in this proceeding. See the Statement of Senator McClellan during the debates prior to the passage of the Landrum-Griffin Act at 105 Cong. Rec. 6469-72 (1959); also the other remarks at 6107, 6108 (Sen. Goldwater), 6228 (Sen. Allott) and 6392 (Sen. Church). Similarly, in *Wood* v. *Dennis* (C.A. 7, 1973), ... F. 2d ....., 84 LRRM 2662, the Court of Appeals in upholding a cause of action under Section 101(a)(1) of the Act (29 U.S.C., Section 411(a)(1) against petitioner here, stated: "The Congress when it started its task of revising this country's labor laws was well aware of what representative Landrum referred to as . . . a significant lack of democratic processes in certain unions, that one-man dictatorships have thrived—in some instances for 20 to 30 years—and that through intimidation and fear, the rank and file union member has been deprived of a voice in his own union affairs 105 Cong. Rec. 14342 (1959)."

interpretation of the statute or a departure from any precedent.[16]

It is submitted that the interlocutory decision below, being in harmony with other decisions of this Court and the Circuits and not being ripe for review because it involves a yet unresolved factual dispute between the parties, is inappropriate for review.

Respectfully submitted,

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[16] Petitioner's irrelevant expression of doubt as to the reliability of any count of votes at this time and reference to petitioner's financial inability to be without the dues increase are subjective, personal pleas extraneous to the issue as to whether there has been a failure of statutory compliance by the petitioner in imposing a dues increase on unwilling members. These side issues open the door to counterstatements: as to the petitioners being solely responsible for delay in providing a count; the exorbitant officer salaries and pensions; high level nepotism and other abuses of the union treasury; and the allegations by the union, in opposition to motions for injunction, that it could readily rebate any judgment; all of these matters are impertinent at this stage of the proceedings to the question of the enforcement of the statute.